Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-320

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT No. 27,

Petitioners,

vs.

CROW TRIBE OF INDIANS: LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION: EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over nonIndians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on state-owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

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INTEREST OF THE STATE OF WASHINGTON

In the State of Washington, there are twenty-five Indian Reservations. Much of the land on these reservations

has passed into nonIndian ownership, pursuant to federal polices which, though initiated in the last quarter of the last century,[1] continue in their effect to this day. According to 1980 census data, some 79,000 persons live within twenty-three of these reservations, of whom some 16,000 are Indians, and the rest, some 63,000, are nonIndians.[2] These reservation residents, Indian and nonIndian alike, require the same sorts of governmental services as all other residents of the State. Such on-reservation services include the provision of roads, police protection, schools and various social services. For example, in Washington there are over 40 separate school districts located in whole or in part within a reservation, serving over 7,000 Indian children.

The State of Washington, accordingly, has a two-fold interest in this case. First, it has a direct interest stemming from the on-reservation activities of its agencies and local governments. To what extent do these activities subject those agencies and local governments to tribal jurisdiction of one sort or another?

Second, the State has a less direct, but no less important interest. It is the same interest as prompted the participation of the State Attorney General as amicus curiae in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Simply put, that interest is in protecting a large

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[1]These policies were principally embodied in the General Allotment Act of 1887, 24 Stat. 388.

[2]See General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages." pp. 1-300 through 1-303. The classification in Table 71, it should be noted, allows only an approximation of tribal and non-tribal members, since some Indians may well not be members of the tribe on whose reservation they reside.

These non-member Indians are, vis-a-vis the Tribe, in the same legal status as nonIndians. Cf *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, at 161 (1980). And our concern, accordingly, extends to them as well. We shall, however, use in this brief the Census Bureau classification, "Indian" and "NonIndian", rather than "member" and "non-member".

group of the State's citizens from the power of a tribal government in which they cannot participate in any way, and whose actions cannot be challenged in a federal court. After *Oliphant*, protection exists in the criminal area. But at least in the Ninth Circuit, little if any such protection exists in the civil area, as the opinion of the Ninth Circuit in this case demonstrates so strikingly.

SUMMARY OF ARGUMENT

This case presents two separate, but closely related, questions. The first involves the existence of a remedy in federal court for an unlawful exercise of jurisdiction by a tribal court over a non-member. The second involves the criteria for determining whether such an exercise of jurisdiction is actually lawful or not.

Because we consider the first question relatively easy of resolution, and the second more difficult, this brief focuses primarily on that second question. And we take it up initially.

Although the District Court characterized that question as one of federal common law, that characterization may be misleading. For it obscures the central issue: What did the Congress intend? Following the approach established in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), the Court should, in addressing this issue, avoid reliance upon "platonic notions of Indian sovereignty", and instead examine the applicable treaty and statutory provisions.

The first set of provisions to be examined is found in Article 2 of the Second Treaty of Fort Laramie, 15 Stat. 649 (1868), which established the Crow Reservation "for the absolute and undisturbed use and occupation of the Indians" and forbade nonIndians to "pass over, settle upon, or reside in" the Reservation. Although that language clearly recognizes that the Indians were to continue to govern themselves as before, free from state law, it does not even purport to answer the question involved here: Are

the Indians to govern nonIndians as well? For Article 2 provides that nonIndians were not to set foot on the Reservation at all.

Light is shed on that question, however, by Article 1 of the same treaty, which provides that recompense from nonIndians who harm Indians is a matter for the United States, not the Crow Tribe. Article 1 thus directly addresses the precise question involved here, *viz.*, the power of the Tribe over nonIndian tortfeasors. It shows the Tribe was not to have this power.

When federal policy regarding nonIndian settlement on reservations changed, and nonIndians were in effect invited onto the Crow Reservation by the General Allotment Act of 1887, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751, to settle and become landowners there, those Acts contemplated that the nonIndians would continue to be free from Indian tribal government. For they contemplated the actual elimination of that government, for Indians and nonIndians alike.

The subsequent halting of the allotment process and of the selling of reservation lands to nonIndians, accomplished by the Indian Reorganization Act of 1934, 48 Stat. 984, did not result in nonIndians coming under tribal jurisdiction. The Bureau of Indian Affairs attempted to have such jurisdiction conferred upon tribal governments; but the Act which was actually adopted by the Congress represents a repudiation of that attempt.

Further, this reading of the Indian Reorganization Act is confirmed by an opinion of the Solicitor of the Department of Interior, issued shortly after the passage of that Act. Under that opinion, the inherent authority of a tribal government must be confined to tribal members, who can avoid that authority by severing their tribal membership.

If the authority of a tribal government is not confined to tribal members, serious constitutional issues arise. For it is questionable that the Congress could, under the Bill of

Rights, subject nonIndian reservation residents to a tribal government in which they cannot participate in any way, precisely because of their status as nonIndians and nonmembers.

Montana v. United States, 450 U.S. 544 (1981) confirms our basic submission, viz., that tribal governments have no jurisdiction, civil or criminal, over nonIndians. The exceptions to this general conclusion—exceptions which the Court discusses in *dicta* in *Montana*—are not applicable in this case, and, in any event, must be applied very narrowly, in order to avoid conflict with congressional intent.

Regarding the question of a federal remedy for nonIndians who are subjected to a legally unauthorized assertion of tribal jurisdiction, the federal courts have authority, under 28 U.S.C. § 1331, to provide that remedy. And the Indian Civil Rights Act, 25 U.S.C. §§ 1301 et seq., did not take that remedy away. In the final analysis, that Act has nothing to do with the petitioners' claim in this case. In thinking that it did, the Court of Appeals made a fundamental error.

ARGUMENT

I. INTRODUCTION

Twelve years ago, this Court rejected reliance upon "platonic notions of Indian sovereignty" as a basis for determining the scope of an Indian's immunity from state law. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973). In so doing, the Court stated that one must "* * * look instead to the applicable treaties and statutes which define the limits of state power", with the concept of Indian sovereignty providing only a "backdrop" for the reading of those treaties and statutes. *Ibid.*

McClanahan provides the proper focus here as well. This case involves, to be sure, an effort by an Indian community to assert governmental power over a member or

unit of the nonIndian community and not, as in *McClanahan*, an effort by the nonIndian community to assert governmental power over a member of the Indian community. But that difference does not, we submit, make the platonic notion of Indian sovereignty any more useful here, or concentration upon applicable treaties and statutes any less important.

Indeed, in this case it is especially important to focus upon the applicable treaty and statutory provisions; for the opinions issued so far in this case may represent something of a false start. The opinion of the District Court, the opinion of the court below, and that of Mr. Justice Rehnquist as Circuit Justice, all characterize the question of the scope of the tribal court's jurisdiction over nonIndians as one of "federal common law". And they thus characterize the other question here presented as one of federal court jurisdiction to pass upon an issue of federal common law. See 560 F.Supp. 213, at 215 (E.D. Mont. 1983), 736 F.2d 1320, at 1323 (9th Cir. 1984), and ___ U.S. ___, 105 S.Ct. 7 (Sept. 10, 1984).

This characterization, though not entirely inaccurate, may be misleading. The use of the phrase "common law" reflects an important fact; judge-made law is critically important in resolving the question of tribal court jurisdiction. But that judge-made law should be, in the final analysis, an effort to ascertain the intent of the Congress, as manifested in various federal statutes and treaties, and not an exercise in divining the content of a platonic notion though an exegesis of the Court's former opinions.

Moreover, whether one views the problem of the scope of tribal jurisdiction as one of "common law" or of Congressional intent has important practical consequences. Problems in this area inevitably involve a balancing of federal, state and Indian interests; and it makes a difference whether the Court views its role as that of striking the balance itself, or of ascertaining the balance that Congress has struck.

This is not to suggest that the manner in which the Congress has struck the balance is always clear. Far from it. But to abandon the focus upon Congressional intent is, we believe, to make virtually impossible what is a very difficult task at best.

Furthermore, to recognize that the question ultimately *is* one of Congressional intent is to recognize also that the Constitution may have a bearing on the question, so as to restrict the range of choices open to the Congress in this area, no less than in others.

In the present case, for example, one may ask: Did Congress intend that tribal courts alone, to the complete exclusion of federal courts, should be able to determine whether an assertion of tribal civil jurisdiction over nonIndians exceeds the bounds intended by Congress?

One may also ask: Did Congress intend that tribal civil jurisdiction should extend to non-members of the tribe who have not, in some manner, voluntarily subjected themselves to such jurisdiction, and who cannot, because they are non-members, participate in tribal government in any way?

Phrasing the questions in this manner places in sharp focus our submission that fundamental civil rights are at stake in this case. They are "fundamental" in the original sense of that word; they are embedded in the very foundation of our American governmental system. And they do not become less fundamental because an Indian tribal government, the representative of an historically deprived people, is attempting to eliminate those rights.

One last preliminary point. The approach which we here suggest is precisely that taken by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The question there before the Court was whether the State of Georgia had the power to control the right of nonIndians to enter Cherokee territory. To answer that question, the Chief Justice examined in great detail the various provisions of two treaties between the Cherokees and the

United States; viz., the Treaty of Hopewell, 7 Stat. 18 (1785) and the Treaty of Holston, 7 Stat. 39 (1791), together with various Acts of Congress regulating Indian affairs. See 31 U.S. (6 Pet.) at 551-556. From this analysis he concluded that the Cherokees were "* * * a nation admitted to be capable of governing itself." 31 U.S. (6 Pet.) at 556. Accordingly, Georgia's assertion of power violated these provisions.

The Chief Justice, in short, did not start with the platonic notion of tribal sovereignty, and then attempt to ascertain what governmental powers were encompassed by that notion. Rather, he asked what conclusion was required by specific treaty and statutory provisions, and based his conclusion squarely upon those provisions. Thus, the approach we here suggest is hardly new.

We turn, then, to an examination of the treaty and statutory provisions applicable in this case.

II. CONGRESS DID NOT INTEND THAT THE CROW TRIBAL COURT SHOULD HAVE JURISDICTION OVER TORT CLAIMS BY A TRIBAL MEMBER AGAINST A NON-MEMBER.

A. The Treaty Provisions

The Crow reservation was established by the Second Treaty of Fort Laramie, 15 Stat. 649 (1868).[3] Article 2 of the Treaty provides as follows:

> "The United States agrees that the following district of country, to wit: [description of reservation boundaries omitted] *shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named,* and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, * * *" (Emphasis supplied)

By this language the Treaty not only vested in the Crows a proprietary interest in the reservations lands, but it established as well the right of the Crows to self-government. They were governing *themselves* before the coming of the nonIndian, and they were to continue to do so afterwards. As this Court said with respect to similar language in the 1868 Treaty with the Navajos (15 Stat. 667):

> "Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia,* was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams v. Lee,* 358 U.S. 217, at 221, 222 (1959).

So too with the Crows.

But is it also implicit in these treaty terms that nonIndians, as well as Indians, will be subject to the jurisdiction of this tribal government? That is the critical question here. The language of Article 2, however, is of little help in answering that question. For that language clearly contemplated that nonIndians would not be on the reservation at all. With the exception of certain federal agents and employees, nonIndians were simply to stay out.

But what if they did not stay out? Did tribal jurisdiction then apply? While Article 2 does not answer this question, Article 1 does. That portion of the Treaty reads:

[3] The First Treaty of Fort Laramie, 11 Stat. 749 (1851) was entered into by the United States and several Indian Tribes, including the Crows. By that treaty, the signatory tribes acknowledged various designated lands as their respective territories, but did not establish any actual reservation. See *Montana v. United States,* 450 U.S. 544 at 548, 558 (1981). The reservation later created by the Second Treaty of Fort Laramie was subsequently reduced by various statutes to its present area of approximately 2.3 million acres. *Montana, supra,* 450 U.S. at 548.

"* * * If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, *and also re-imburse the injured person for the loss sustained.*" (Emphasis supplied)

This language clearly negates any possible inference from Article 2 or any other treaty provision that the Tribe itself was to exercise jurisdiction, either criminal or civil, over nonIndians for wrongs committed against Indians.[4]

The Second Treaty of Fort Laramie, in sum, shows no Congressional intent that the Tribe was to have civil jurisdiction of the sort asserted here over nonIndians; indeed, it shows just the opposite intent. The question then becomes: Has Congress, through subsequent acts, changed that intent? As we shall next show, far from changing it, the Congress has reaffirmed it.

B. The Allotment Acts

As we have seen, under the Second Treaty of Fort Laramie nonIndians within the Crow Reservation were generally to be considered as intruders. For the entire reservation was set aside for the "absolute and undisturbed use and occupation" of the Indians. With the General Allotment Act of 1887, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751, that situation changed. NonIndians were, in effect, invited onto the reservation by the Federal Government to become landowners and settlers. See *Montana v. United States*, 450 U.S. 544, at 548 (1981).

[4]By way of contrast, the earliest treaties typically provided that the nonIndian intruder would forfeit the protection of the United States and would be subject to tribal punishment. See, e.g., Article V of the Treaty of Hopewell with the Cherokees, 7 Stat. 18 (1785); see also Article V of the Treaty with the Choctaws, 7 Stat. 22 (1978), discussed in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, at 198, n. 8 (1978).

As noted in *Montana*, as a result of this change in policy, the State of Montana itself now owns two percent of the reservation land in fee simple. *Ibid.* And as noted by the District Court, the accident involved in this case took place on part of this State-owned land. (See 560 F.Supp. 213, at 214.

In *Montana*, the Court made an extensive review of the intent and purpose of the Allotment Acts as shown by their legislative history. See *Montana*, 450 U.S. at 559, n. 9. The Court noted that "[T]he policy of the Acts was the eventual assimilation of the Indian population", and the concomitant "* * * dissolution of tribal relations." *Ibid.* The Court then concluded:

"There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. [citations omitted] *It defies common sense to suppose the Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction* when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." (Emphasis supplied) *Ibid.*

Thus, even if, contrary to our initial submission, Congress intended in the Treaty that the Crows have jurisdiction of the type here asserted, the Allotment Acts show that Congress changed its intent.

C. The Indian Reorganization Act

In 1934, Congressional policy shifted once again, in the Indian Reorganization Act, 48 Stat. 984 (25 USC § § 461 et. seq.) The legislative history of that Act is no less important than the legislative history of the Allotment Acts. For it shows that Congress continued its prior policy of denying to Indian Tribes any general civil jurisdiction

over nonIndians, while reversing, however, the prior policy of alienating lands to those nonIndians.

The Indian Reorganization Act, as originally introduced in Congress, was a very different measure from that which eventually passed. The original version was introduced in the House as H.R. 7902, 73rd Cong., 2nd Sess. (1934) and in the Senate as S. 2755, 73rd Cong., 2nd Sess. (1934).

The heart of the bill was Title I, "Indian Self-Government." Section 2 of Title I read, in pertinent part, as follows:

> "In accordance with the foregoing purposes, the Secretary of the Interior is hereby authorized to *issue* to the Indians residing upon any Indian reservation or reservations or subdivision thereof a *charter granting to the said community group any and all such powers of government * * * as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned * * **" (Emphasis supplied)

Section 4 then spelled out in more detail the powers which were to be included in the charter. The first is found in subsection (a):

"(a) To organize and act as a *Federal municipal corporation,* to establish a form of government, to adopt and thereafter to amend a constitution, and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, *and any other functions customarily exercised by local governments.*" (Emphasis supplied)

Subsection (d) granted another important power:

"(d) To establish courts *for the enforcement and administration of ordinances of the community,* which courts shall have *exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, under the ordinances of such community, and jurisdiction exclusive or non-exclusive over all other cases arising under the ordinances of the community,* and shall have power to render and

> enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding $500, or in the alternative, by imprisonment for a period of not exceeding six months: * * *" (Emphasis supplied)

Title IV of the original bill also dealt with courts, establishing a Court of Indian Affairs. Section 3 of this Title spelled out the broad jurisdiction of that court, which included jurisdiction "of all cases, civil or criminal, arising under the laws and ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community." (Subsection 4)

Clearly, under this proposed legislation, a chartered Indian community was to have broad legislative jurisdiction over non-members—as broad as those of any municipal corporation or other unit of local government. And the tribal courts and the Court of Indian Affairs would have jurisdiction over non-members as well.

Title I and Title IV, however, did not survive. And a major reason was that the chairman of the Senate Committee on Indian Affairs, Senator Wheeler from Montana, was adamantly opposed.

In the hearing on S. 2755, the following exchange took place concerning Title I:

> "The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians in Montana who would want to try this, and they might have a sufficient number of signers to a petition to have a charter issued.
>
> "Commissioner Collier [of the Bureau of Indian Affairs]. Yes.
>
> "The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and, in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that it would lead to conflicts in the Northwest between the Indians and the whites.

"I mean, supposing the Indian Bureau went out there, for instance, if you had this provision in there, your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there, which would be, in my judgment, a serious mistake on the part of the Indians to do it." Hearing Before the Committee on Indian Affairs, United States Senate on S. 2755, 73rd Congress, 2nd Sess. (1934) p. 68 (hereinafter "1934 Hearings").

Senator Wheeler liked the proposed court system in Article IV no better. Under discussion was an amendment, proposed by the BIA, involving the criminal jurisdiction of the court:

"Commissioner Collier. Mr. Chairman, this amendment would leave with the proposed new court of Indian affairs all prosecutions for crimes insofar as they are prosecutions under the laws affecting Indian country.

"The Chairman. Yes; but it is perfectly ridiculous to set up this separate court." 1934 Hearings, p. 205.

The discussion then turned to the jurisdiction of the court, in the case of a nonIndian trying to collect a debt from an Indian. And Senator Wheeler expressed his views about the proposed court once again.

"The Chairman. If you ever get this through Congress I will be surprised, because it is perfectly ridiculous in my judgment.

"Senator O'Mahoney. Senator, I don't think you agree with this provision.

"The Chairman. Well, I certainly do not agree with it, and I do not think the Indians if they understood it in the Northwest would want it, because of the fact that it would just simply hamper them and retard them rather than do them any good.

"Commissioner Collier. Mr. Chairman, we have explained that we did not regard this section as an integral part of the bill, as indispensable at all.

"The Chairman. Yes; I am glad of that." 1934 Hearings, p. 208.

What happened next is best explained in Senator Wheeler's own words:

"The Chairman. * * * I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, * * *" 1934 Hearings, p. 237.

The bill which the BIA sent up was the bill which ultimately passed. (Compare S. 3645, reproduced at 1934 Hearings, p. 234, and Act of June 18, 1934, 48 Stat. 984). Thus the Congress, in 1934, denied to the Indians the broad, general governmental powers over nonIndians which the BIA has hoped to attain. And that fact is reason enough for this Court to deny the claim to any such powers now.

D. The Understanding of the Executive

The understanding of the Executive Branch has been consistent with that of the Congress. In 1934, shortly after passage of the Indian Reorganization Act ("Wheeler-Howard" Act), the Solicitor of the Department of Interior, Mr. Margold, was squarely faced with the question of the extent of an Indian Tribe's inherent sovereign power over non-members. The specific question was the extent of a Tribe's inherent power of eminent domain. Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I, 484, 489-491, Question 9 (M-27810, Dec. 13, 1984), entitled "Wheeler-Howard Act — Interpretation."[5]

The opinion first considered the source of this tribal power.

"The power of eminent domain is one of the usual

[5]This important opinion remained unpublished until issuance of this two-volume compilation.

powers of sovereignty. It is, as the United States Supreme Court held in *Cincinnati v. Louisville and Nash R.R. Co.*, (223 U.S. 390, 404), 'one of the powers vital to the public welfare of every self-governing community.'

"No Federal statutes terminating the exercise of this power by an Indian tribe are known. Therefore, under the doctrines advanced in the recent opinion of this Department on 'Powers of Indian Tribes' (M-27781, approved October 25, 1934), the power of eminent domain is one of those powers which are vested in an Indian tribe within the meaning of Section 16 of the Wheeler-Howard [Indian Reorganization] Act." *Ibid.*, at 489.

Yet Solicitor Margold nevertheless then concluded:

"I am of the opinion that the Indian Service is correct 'in assuming that a tribe organized under section 16 may exercise the power of eminent domain in the acquisition of land as against its members, *but not in the case of land owned in fee by non-members.*'" *Ibid.* (Emphasis supplied)

The inherent power of eminent domain, which is "one of the usual powers of sovereignty", may thus be exercised only with respect to tribal members.

From this, Solicitor Margold drew another important conclusion.

> "It is proper to add that since the tribal power of condemnation is based, in the first instance, upon tribal jurisdiction over the members of the tribe, it ceases to exist where an Indian abandons his tribal membership; and as was said in the opinion of this Department on "Powers of Indian Tribes," (M-27781, approved October 25, 1934, at page 36), 'any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses.' * * *
>
> "Threatened oppression in the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal status. But if he remains to share in the benefits of tribal live he must bear its burdens.

> "The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law." At 490.

NonIndians are in the same status as the Indian who has severed his tribal membership, as the opinion goes on to make clear.

> "Accordingly, patented land may be condemned, as it may be taxed on exactly the same basis as the lands of non-Indians. An Indian tribe will have whatever rights of condemnation the laws of the State may give to it.
>
> "* * *
>
> "Land held in fee, therefore, whether owned by Indians or by non-Indians, may be condemned by an Indian tribe only in accordance with State law, through proceedings brought in State courts. At 490, 491."

This opinion thus explicitly recognized that a tribal claim of general governmental power, whether it involves condemnation, taxation, or any other form of civil jurisdiction, is valid only with respect to tribal members. The opinion also recognized that our system of government has no room for "threatened oppression in the form of condemnation, taxation, or other incidents of social control" over those non-members.

E. Constitutional Considerations

The reference to "threatened oppression" in Solicitor Margold's opinion serves as a reminder that important constitutional issues are here involved. We are not suggesting that they need final resolution here; but they certainly form a "backdrop" which is no less important than the backdrop of tribal sovereignty which is to be considered here.

Tribal governments are not subject to the Bill of Rights, which governs the conduct of the Federal Government, or to the Fourteenth Amendment, which governs that of the States and its political subdivisions. *Talton v.*

Mayes, 163 U.S. 376 (1896). This is because Indian Tribes, unlike political subdivisions of a State, do not exercise power delegated by a superior sovereign. *United States v. Wheeler*, 435 U.S. 313 (1978).

But if, as we submit, the ultimate controlling factor in this case is congressional intent, the Bill of Rights surely controls the permissible scope of that intent. And this gives rise to an obvious problem. How can it be permissible for Congress to intend—and thereby bring about—a system of government which itself would surely be constitutionally impermissible to the extent that non-members who are subject to it cannot possibly participate in it, through the voting franchise or otherwise?[6]

Talton v. Mayes, supra, shields tribal governments from the Bill of Rights; but it does not shield the Congress.[7] Further, it is not just a question of Congress tolerating the continued existence of tribal governments through inaction. If tribal governments are to be true governments, recognizable as such by the federal courts, they must first be recognized as such by the Congress, in a treaty or statute, or by the Executive pursuant to congressional authority. Absent congressional action, the problem does not even arise. And that fact is itself a large part of the problem.

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[6]We recognize that the Crow Tribe is here asserting jurisdiction over a political subdivision of the State of Montana, and not a natural person. But surely the jurisdictional issue must be resolved in a manner which applies to natural persons as well, i.e., to nonIndian reservation residents in the same status as those involved in *Montana v. United States*.

[7]The applicability of the Constitution to the congressional exercise of its treaty-making power with the Indians, and the constitutional difficulties in a broad grant of tribal jurisdiction over nonIndians, were recognized by the Attorney General of the United States 150 years ago. In 2 Op. Atty. Gen. 693 (1834), relied upon in *Oliphant*, 435 U.S. at 199, the Attorney General stated, with regard to the treaty of Dancing Rabbit (7 Stat. 33), entered into with the Choctaws in 1830:

> "For the more effectual accomplishment of the same end [creation of a territory for the Choctaws west of the Mississippi], the government and people of the United States, by the 4th article of the treaty, engaged to 'secure to the Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits west.' If this provision had stopped here, it would have indicated an intention on the part of the framers of the treaty to give to the Choctaws a jurisdiction and government exclusive of all interference by the United States, or any other authority, and broad enough to authorize the particular proceedings now before me; *though it is by no means clear that such a treaty could have been made, or would be valid, under the constitution of the United States.*" 2 Op. Atty. Gen. at 694. (Emphasis supplied)

This constitutional issue is really a form of the familiar "state action" issue. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). And Solicitor Margold's opinion points the way, we believe, to a solution. Tribal government can apply only to tribal members; but those members are perfectly free to avoid the jurisdiction of that government by becoming non-members. That solution, we suggest, is consistent with the understanding of the framers of our Constitution as construed in *Talton v. Mayes*, i.e., that tribal governments were to continue, if Congress so wished, just as they were before the adoption of that Constitution, exercising jurisdiction over members only, unfettered by the Constitution itself. And it assures that non-members will not be deprived of the benefit of the Bill of Rights.[8]

F. The Applicability of Montana v. United States

In *Montana*, this Court held that the Crow Tribe did not have the power to prohibit or otherwise regulate hunt-

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[8]In an opinion issued on Oct. 25, 1934, shortly before his Dec. 13, 1934 opinion discussed above, Solicitor Margold did recognize a type of civil jurisdiction even over non-members. In "Powers of Indian Tribes", he stated that the tribal taxing power "* * * may be exercised over members of the tribe and over non-members, so far as non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 ID 14, at 46 (1934). So long as the tribal sanctions are confined to withdrawal of the privileges, we see no constitutional problems in this position, or any inconsistency with Solicitor Margold's subsequent opinion of Dec. 13, 1984.

ing and fishing by nonIndians on nonIndian lands within the Crow Reservation. This holding and its rationale are, we submit, consistent with our submission and controlling here. We expect that the Petitioners will discuss *Montana* at some length and we need not duplicate that discussion.

One portion of the *Montana* opinion, however, requires comment. The Court concluded that the principles applied in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), rejecting a tribal claim of inherent authority to exercise criminal jurisdiction over nonIndians, were generally applicable to an assertion of civil jurisdiction as well. *Montana*, 450 U.S. at 565. But the Court then went on to spell out in *dicta* two exceptions to this general conclusion.

> "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on the non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee, supra*, at 223; *Morris v. Hitchcock*, 194 US 384; *Buster v. Wright*, 135 F. 947, 950 (CA8); see *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 US 134, 152-154. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court*, 424 US 382, 386; *Williams v. Lee, supra*, at 220; *Montana Catholic Missions v. Missoula County*, 200 US 118, 128-129; *Thomas v. Gay*, 169 US 264, 273; * * *" *Montana*, 450 US at 565, 566.

For the reasons discussed in the instant case by the District Court, however, neither exception is applicable in this case. See 560 F. Supp. 213, at 216, 217. As there pointed out, this dispute involves no contract, lease, or other commercial arrangement. Nor does denial of the

tribal power here realistically threaten the political integrity, economic security, or health or welfare of the *Tribe*.

If this Court is inclined to construe these exceptions more broadly than did the District Court and find them applicable here, then additional questions arise. Do these exceptions really have a basis in statutory or treaty provisions? If so, what are those provisions? For again, the issue of the Tribe's jurisdiction is ultimately one of congressional intent, not common law.

To be more specific, we see no difficulty with the proposition that nonIndians may voluntarily submit themselves to tribal jurisdiction. The situation in *Williams v. Lee*, 358 U.S. 217 (1959) provides the clearest illustration of this point. A nonIndian wished to sue a reservation Indian for a debt. The Court held that the Indian debtor could not be sued in state court. As a result, the nonIndian creditor was left with the choice of suing in tribal court, or not suing at all.

Similarly, a Tribe might condition the privilege of doing business with the Tribe or its members upon a voluntary submission to tribal jurisdiction over that business, though the submission should not be implied after the fact, but be based upon a conscious choice, as in the *Williams v. Lee* example. And if the first part of the *dicta* in *Montana* is so confined in its application, it is unexceptionable and not inconsistent with congressional intent.

With respect to the second part, an approach similar to that adopted for state and local governments in *National League of Cities v. Usery*, 426 U.S. 833 (1976) might be adopted for Tribes as well. This approach might result in certain types of tribal jurisdiction over nonIndians being necessary to preserve the integrity of tribal government as such, though we are frankly hard put to imagine actual examples which would not involve a voluntary submission of the *Williams v. Lee* type discussed above.

Extending the application of the *dicta* in *Montana* beyond these narrow limits would entail problems of con-

sistency with congressional intent and, no less importantly, of consistency with basic constitutional rights.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT HAVE JURISDICTION UNDER 28 U.S.C. § 1331.

The question of the District Court's jurisdiction can be disposed of briefly. In denying federal question jurisdiction under 28 U.S.C. § 1331, the Court of Appeals misapplied *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1977). Relying upon *Santa Clara*, the court stated:

> "In asking that we recognize a civil cause of action arising under federal common law, National is requesting that we supplement a remedy Congress intended to be exclusive, and that we do so without statutory authority." 736 F.2d 1320, at 1323.

Santa Clara involved a claim by a tribal member against a Tribe based upon an alleged violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § § 1301 et. seq. The tribal member had no federal remedy before the passage of the ICRA and the Court held that the ICRA did not create one. For the reasons discussed by Mr. Justice Rehnquist in his opinion as Circuit Justice in this case, ___ U.S. ___, 105 S.Ct. 7 (Sept. 10, 1984), it is highly questionable that the *Santa Clara* rationale would apply to a claim by a non-member.

Moreover, as we understand the Petitioners' claim and the District Court's ruling on that claim, the ICRA, in the final analysis, has nothing to do with the matter at hand. The basic claim is not that the tribal court exercised jurisdiction in a manner which violated the ICRA. Rather, it is that the tribal court exercised jurisdiction which it did not have at all.

It is the existence of that jurisdiction in the first place, not the manner of its exercise, which is at issue here. And that fundamental issue is within the District Court's jurisdiction under 28 U.S.C. § 1331. A federal remedy ex-

isted before passage of the ICRA; and the ICRA did not take that remedy away.

CONCLUSION

For the reasons given above, the judgment of the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED this 18th day of January, 1985.

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